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In the Supreme Court of the United States

HERMAN APPEL, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

As a result of the 1996 amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a removable alien is ineligible for a discretionary waiver of inadmissibility under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994), if the alien was previously convicted of an aggravated felony. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court, based on principles of non-retroactivity, held that the 1996 amendments do not apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The questions presented are:

1. Whether this Court's holding in *St. Cyr* applies to an alien who rejected a plea agreement and was convicted of an aggravated felony after trial.

2. Whether the 1996 amendments apply to an alien who did not affirmatively seek Section 212(c) relief before he was placed in removal proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the *Federal Reporter*, but is *reprinted in* 146 Fed. Appx. 175. The order of the district court (Pet. App. 6-7) is unreported. The report and recommendation of the magistrate judge (Pet. App. 8-21) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5) was entered on August 25, 2005. A petition for rehearing was denied on April 17, 2006 (Pet. App. 29). The petition for a writ of certiorari was filed on July 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized a permanent resident alien with a lawful unrelinquished domicile of seven consecutive years to apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). In the Immigration Act of 1990, Congress amended Section 212(c) to preclude from eligibility for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. Pub. L. No. 101-649, § 511, 104 Stat. 5052. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to preclude from eligibility for discretionary relief any alien previously convicted of certain types of offenses, including an aggravated felony or a controlled-substance offense, without regard to the amount of time spent in prison. Pub. L. No. 104-132, § 440(d), 110 Stat. 1277.

Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A precludes from discretionary relief an alien who has been convicted of an aggravated felony. See 8 U.S.C. 1229b(a)(3). In *St. Cyr*, *supra*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement if, at the time of the

plea agreemen e conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326.

2. Petitioner is a native and citizen of Austria. In 1979, he was admitted to the United States as a lawful permanent resident. In 1992, a jury found him guilty of two counts of sale or transportation of a controlled substance (cocaine) and one count of possession or purchase for sale of a controlled substance (cocaine), in violation of California law. Before proceeding to trial, petitioner had rejected a plea agreement offering a term of imprisonment of seven years. Petitioner was sentenced to a term of imprisonment of eight years, and he served less than five years. In 1993, petitioner pleaded guilty to conspiracy to distribute and possession with intent to distribute a controlled substance in violation of federal law. He was sentenced to a term of imprisonment of 54 months, to run concurrently with his state conviction. Pet. 6-7; Pet. App. 9, 48.

In 1997, on the basis of petitioner's 1992 convictions, the government commenced removal proceedings against him. The government alleged that petitioner was deportable as an alien who had been convicted of an aggravated felony and controlled substance offenses. See 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii) and (B)(i). On March 10, 1998, the immigration judge (IJ) found petitioner deportable as charged and ordered petitioner removed. The IJ concluded that petitioner was ineligible for discretionary relief under former Section 212(c) because IIRIRA had repealed such relief for aliens convicted of an aggravated felony. Pet. App. 9-10. The Board of Immigration Appeals (BIA) affirmed the IJ's decision and dismissed petitioner's appeal. *Id.* at 26-28. Petitioner appealed the BIA's decision to the Ninth Cir-

cuit, which dismissed the petition for lack of jurisdiction. *Id.* at 22-24.

3. In April 2003, petitioner filed a petition for a writ of habeas corpus in the district court. Pet. App. 8. Relying on principles of non-retroactivity as applied in this Court's decision in *St. Cyr*, petitioner argued that, because his relevant criminal convictions predated IIRIRA, that statute's repeal of Section 212(c) relief was not applicable to him. The district court rejected petitioner's argument. Pet. App. 7, 14-17. The court reasoned that *St. Cyr* was inapplicable because petitioner was convicted after a trial rather than through a guilty plea, and that unlike an alien whose conviction was based on a guilty plea, "[p]etitioner had no 'settled expectations' that flowed from his conviction by a jury." *Id.* at 16.

The court of appeals, after converting petitioner's habeas appeal into a proceeding on a petition for review pursuant to Section 106(c) of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 311, denied the petition for review in an unpublished memorandum order. Pet. App. 1-4. The court relied on its previous decisions holding that *St. Cyr* is inapplicable, and that the repeal of Section 212(c) therefore applies, to an alien whose pre-IIRIRA conviction followed a trial rather than a guilty plea. *Id.* at 3-4.

ARGUMENT

1. Petitioner contends (Pet. 9-19) that the holding of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which involved aliens convicted of an aggravated felony through a plea agreement, should be extended to aliens who rejected a plea agreement and were convicted of an aggravated

felony after trial. That contention lacks merit and does not warrant review.

a. In *St. Cyr*, this Court addressed the situation of aliens who pleaded guilty after Section 212(c) was amended in 1990 to render ineligible for relief any alien convicted of an aggravated felony who had served a prison term of at least five years. A plea agreement providing for a sentence of less than five years thus would have assured the alien's eligibility for relief under then-current law. See 533 U.S. at 293, 321-324. This Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." *Id.* at 321-322 (internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon [the] likelihood [of receiving Section 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

St. Cyr therefore was grounded in the notion that, because aliens in St. Cyr's position would have based their decision to plead guilty on the continued availability of discretionary relief, the plea of guilty gave rise to a reasonable reliance interest and expectations in pre-

serving eligibility for that relief. In short, as the Court recently observed in describing the reasoning of *St. Cyr*, the "possible discretionary relief" was "a focus of expectation and reliance" in the decision to plead guilty as part of a "*quid pro quo* agreement." *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2432 & n.10 (2006) (citing *St. Cyr*, 533 U.S. at 323).

The courts of appeals have uniformly declined to extend the holding of *St. Cyr* to aliens who were convicted of an aggravated felony after a trial rather than through a guilty plea. See *Hernandez-Castillo* v. *Moore*, 436 F.3d 516 (5th Cir.), cert. denied, No. 05-1251 (Oct. 2, 2006); *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002); *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1036-1037 (7th Cir. 2004) (per curiam); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-1122 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1273-1274 (11th Cir. 2002). Those courts have correctly concluded that "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." *Hernandez-Castillo*, 436 F.3d at 520 (quoting *Rankine*, 319 F.3d at 99).

In particular, unlike an alien who pleaded guilty, an alien who went to trial did not "detrimentally change[] his position in reliance on continued eligibility for § 212(c) relief." *Hernandez-Castillo*, 436 F.3d at 520 (quoting *Rankine*, 319 F.3d at 99). An alien who pleaded guilty "would have participated in the *quid pro quo* relationship, in which a greater expectation of relief is provided in exchange for forgoing a trial," thus implicating

"the reliance interest emphasized by [this] Court in *St. Cyr*." *Ibid.* (quoting *Rankine*, 319 F.3d at 100). Aliens who elected to go to trial, by contrast, "made no decision to abandon any rights and admit guilt—thereby immediately rendering themselves deportable—in reliance on the availability of the relief offered prior to IIRIRA." *Id.* at 520 n.3 (quoting *Rankine*, 319 F.3d at 99). Their decision to go to trial, "standing alone, had no impact on their immigration status," and "[u]nless and until they were convicted of their underlying crimes," they "could not be deported." *Ibid.* (quoting *Rankine*, 319 F.3d at 99). Such aliens, unlike aliens who pleaded guilty, therefore could make no "claim that they relied on the availability of § 212(c) relief in making the decision to go to trial." *Ibid.* (quoting *Rankine*, 319 F.3d at 99).

b. In *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004), the Third Circuit concluded that the holding of *St. Cyr* applied in one particular circumstance to an alien who was convicted of an aggravated felony after trial—specifically, if the alien declined a plea agreement that was offered to him and was subsequently convicted at trial. *Id.* at 494. The court reasoned that aliens "who affirmatively turned down a plea agreement had a reliance interest in the potential availability of § 212(c) relief." *Ibid.* In the court's view, "the then-existing parameters for former § 212(c) eligibility would * * * obviously factor into the decision-making of someone" when deciding whether to accept a plea offer, in that the alien would "need[] to ensure that * * * he would serve less than the five years specified in former § 212(c)." *Ibid.*[1]

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[1] Although the court in *Ponnapula* emphasized that the alien would need to ensure that he would serve less than five years of imprisonment

The *Ponnapula* court's reasoning lacks merit. *St. Cyr* was grounded in the belief that aliens who entered a plea of guilty "waive[d] several of their constitutional rights (including the right to a trial)" in "exchange for some perceived benefit," *i.e.*, "preserving the possibility of [Section 212(c)] relief." *St. Cyr*, 533 U.S. at 322-323. Such aliens, the Court reasoned, "almost certainly relied upon [the] likelihood" of "receiving § 212(c) relief" in "deciding whether to forgo their right to a trial." *Id.* at 325. By contrast, an alien who declined a plea offer and went to trial could not be said to have detrimentally relied on the availability of Section 212(c) relief. Unlike an alien who pleaded guilty to an aggravated felony at a time when such a plea did not render the alien ineligible for Section 212(c) relief, an alien who declined a plea offer and went to trial could not make a comparable claim that he made his decision in reliance on his eligibility to receive Section 212(c) relief and might have made a different decision if he had anticipated that conviction of an aggravated felony would render him ineligible for discretionary relief. Indeed, if the alien had anticipated that conviction of an aggravated felony would render him ineligible for discretionary relief, the only way to preserve eligibility would be to *exercise* the right to a trial (rather than to forgo it) in the hopes of obtaining an acquittal.

St. Cyr also emphasized that, not only did the alien receive a benefit in entering a guilty plea by preserving

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in order to retain eligibility for Section 212(c) relief under pre-IIRIRA and pre-AEDPA standards, see p. 2, *supra*, the court indicated that its application of *St. Cyr* to aliens who affirmatively declined a plea offer would apply even if the sentence contemplated by the rejected plea offer (as well as the sentence imposed after trial) was for a term of more than five years of imprisonment. See 373 F.3d at 495-496 & nn.15-16.

eligibility for Section 212(c) relief, but the government also received a benefit by obtaining a conviction without the need for a trial. 533 U.S. at 321-322. It is in that sense that the Court considered "[p]lea agreements [to] involve a *quid pro quo* between a criminal defendant and the government." *Id.* at 321. When an alien declines a plea agreement and elects to go to trial, however, there is no such *quid pro quo*. *St. Cyr* is inapplicable in such circumstances for that reason as well. For these reasons, *St. Cyr* does not apply to an alien who declined a plea agreement and was convicted of an aggravated felony after trial.

c. Although the result below appears to be inconsistent with the Third Circuit's decision in *Ponnapula*, there is no warrant for this Court to grant review. As a threshold matter, because the per curiam opinion below is unpublished and does not address or distinguish *Ponnapula*—or contain any discussion of the possible significance of the fact that petitioner declined a plea agreement before going to trial—it does not create controlling precedent in the Ninth Circuit that conflicts with *Ponnapula*. And for the same reasons, this case would in any event present a poor vehicle for resolving the issue addressed by *Ponnapula*.

Moreover, that issue is unlikely to recur with any substantial frequency. The issue addressed by *Ponnapula* could arise only in circumstances in which an alien (i) was convicted of an aggravated felony before IIRIRA; (ii) the conviction occurred after a trial rather than through a guilty plea; and (iii) the alien was offered and declined a plea agreement before going to trial. In that light, the *Ponnapula* court itself observed that "the effect of [its] overall holding is likely to be small." 373 F.3d at 496 n.16. Indeed, apart from the Third Circuit

in *Ponnapula*, no other court of appeals has addressed whether it could be significant that an alien declined a plea offer before being convicted of an aggravated felony at trial.

Even with respect to a case in which the *Ponnapula* issue was squarely raised—*i.e.*, where the alien was convicted of an aggravated felony before IIRIRA, the conviction occurred after trial rather than through a guilty plea, and the alien had declined a plea agreement before going to trial—the issue would be of no practical significance if the alien served a sentence of more than five years on his aggravated felony conviction. In that situation, the alien would be ineligible for Section 212(c) relief even under pre-IIRIRA and pre-AEDPA standards. See *Ponnapula*, 373 F.3d at 496 n.16 (explaining that "many aliens who are within the scope of this holding will nonetheless be statutorily ineligible for § 212(c) relief by reason of having served five years or more in prison"). Furthermore, *Ponnapula* was decided before this Court's decision last Term in *Fernandez-Vargas*, which emphasized the importance of a *quid pro quo* agreement in *St. Cyr*. See p. 6, *supra*. That intervening development undermines the reasoning of *Ponnapula*, which rested on the premise that a *quid pro quo* was not necessary. See *Ponnapula*, 373 F.3d at 488-489, 492 & n.9.

Finally, the issue is of diminishing prospective significance, as it only arises with respect to aliens who were convicted of an aggravated felony at trial before IIRIRA. See *ibid.* (explaining that "the class of aliens

affected by this ruling is constantly shrinking in size as the effective date of IIRIRA recedes into the past").[2]

2. Petitioner argues (Pet. 19-22) that, even if *St. Cyr* does not apply to an alien who declined a plea agreement and was convicted of an aggravated felony at trial, the repeal of Section 212(c) relief is retroactive as applied to him for another reason, *i.e.*, because he could have, but did not, apply "affirmatively" for Section 212(c) relief before he was placed in removal proceedings. There is no warrant for granting review of that claim.

As petitioner acknowledges (Pet. 20), only one court of appeals has held that the repeal of Section 212(c) relief is retroactive as applied to an alien who declined to apply affirmatively for Section 212(c) relief after his conviction but before being placed in removal proceedings. See *Restrepo* v. *McElroy*, 369 F.3d 627 (2d Cir.

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[2] The Tenth Circuit's decision in *Hem* v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006), which was issued after the petition was filed in this case, does not assist petitioner. In that case, the court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) does not apply to an alien "who proceeds to trial but forgoes his right to appeal when § 212(c) relief was potentially available." *Id.* at 1186. The alien had received a sentence of three years of imprisonment, but faced a maximum term of imprisonment of fifteen years. *Id.* at 1187. The court reasoned that an alien might decide to forgo an appeal if a successful appeal could ultimately result in imposition of a sentence of more than five years, such that the alien would thereby be deprived of eligibility for relief under former Section 212(c). *Id.* at 1199. Petitioner does not argue in the petition, and did not argue below, that the repeal of Section 212(c) relief is inapplicable to him on the ground that he declined to appeal his conviction to preserve his eligibility for discretionary relief. In fact, unlike the alien in *Hem*, petitioner was sentenced to more than five years of imprisonment, see p. 3, *supra*, and it therefore was unclear whether he would ultimately serve less than five years so as to retain eligibility for discretionary relief under the then-applicable standards, see p. 2, *supra*.

2004). No other court of appeals (including the court below), has addressed the issue. Moreover, petitioner did not raise the argument below. This Court ordinarily does not review issues that were neither pressed in nor passed upon by the court of appeals, see *United States* v. *Williams*, 504 U.S. 36, 41 (1992), and there is no reason for a different result here.[3]

Finally, the Second Circuit in *Restrepo* did not hold that the repeal of Section 212(c) is inapplicable to *any* alien who could have applied affirmatively for Section 212(c) relief before being placed in removal proceedings but who did not do so. Rather, the court specifically declined to resolve whether an alien would be required to "make an *individualized* showing that he decided to forgo an opportunity to file for 212(c) relief in reliance on his ability to file at a later date," or "whether, instead, a *categorical* presumption of reliance by any alien who might have applied for 212(c) relief when it was available, but did not do so, is more appropriate." *Restrepo*, 369 F.3d at 639. Petitioner has not argued, let alone made any "individualized showing," that he decided to forgo applying affirmatively for Section 212(c)

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[3] Petitioner did not cite the Second Circuit's decision in *Restrepo* in his opening brief in the court of appeals, and he made no argument that the repeal of Section 212(c) is retroactive as applied to him because he could have, but did not, affirmatively apply for Section 212(c) relief before being placed in removal proceedings. Although petitioner later cited *Restrepo* in his *reply* brief in the court of appeals, Pet. C.A. Reply Br. 2-4, even then, petitioner did not rely on the decision for the proposition that the repeal of Section 212(c) would be retroactive as applied to an alien who did not affirmatively apply for relief before he was placed in removal proceedings. Petitioner made no such argument in his reply brief. Rather, petitioner relied on *Restrepo* for the general proposition that a *quid pro quo* exchange is not a precondition for concluding that the application of a statute would be retroactive.

relief in reliance on his ability to do so later if removal proceedings were commenced against him. Accordingly, it is not clear that *Restrepo* could benefit petitioner even if he had raised the argument below.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner also argues (Pet. 22-26) that applying the repeal of Section 212(c) relief to aliens who declined a plea agreement and were convicted of an aggravated felony at trial, while not applying the repeal to aliens who pleaded guilty to an aggravated felony, amounts to an irrational distinction in violation of the Equal Protection Clause. That claim, which was neither raised nor addressed below, lacks merit. Far from being an irrational distinction, the distinction, as explained above, see pp. 6-9, *supra*, follows from application of the considerations of settled expectations, reasonable reliance, and fair notice that inform this Court's inquiry into whether application of a statute would have a retroactive effect. See, *e.g.*, *Landgraf* v. *USI Film Prod.*, 511 U.S. 244, 270 (1994).